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‘When we walk out; what was it all about?’: Views on “new beginnings” from within The International Criminal Tribunal for Rwanda.¹

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The 1994 United Nations Security Council resolution which created the International Criminal Tribunal for Rwanda (ICTR) foresaw it marking a ‘new beginning’ both locally (peace and reconciliation in Rwanda) and globally (strengthening the project of international criminal justice). Over time, however, those who spoke on behalf of the ICTR foregrounded the strictly quantifiable (number of arrests; convictions) and contributions to the global “new beginning” for international criminal justice. Ethnographic fieldwork at the ICTR, however, revealed that lawyers and judges, enmeshed in the Tribunal’s institutional order, held diverse views regarding local and global efficacy, refracted through the sense of power(lessness) that accompanies their respective institutional locations. Focusing on judges’ and lawyer’s attitude to the lack of indictments for members of the Rwandan Patriotic Army for alleged massacres in 1994 and accusations of ‘Victor’s Justice’, the article distinguishes between the ICTR as a disembodied institution that did or did not mark local or global ‘new beginnings’, and the ICTR as a collection of situated persons negotiating their simultaneous empowerment and disempowerment. [Keywords: international criminal justice; Rwanda; reconciliation; peace; ICTR].

It’s my first day at the International Criminal Tribunal for Rwanda (ICTR), Arusha, Tanzania. I meet with an External Relations officer. ‘I haven’t sold my soul to the devil yet,’ he tells me, ‘but there are plenty of people willing to raise the flag and let it flutter in the wind’. He hands me a pamphlet entitled ‘ICTR: Challenging Impunity’. ‘Here’s the propaganda,’ he says, telling me to go and speak to a particular prosecutor, who’ll give me the ‘official line’. ‘He claims that a purpose of the ICTR is deterrence. But, just look what’s

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happening in Darfur,’ waiving his hand northwards, ‘This place is a salve for the conscience of an organization that could have done something in 1994’.

A few days later, I meet two defence lawyers in a hotel bar. ‘It’s a victor’s court, a persecution of Hutus,’ one begins, ‘a way of concealing the responsibility of the International Community’. Will it contribute to reconciliation, I ask. ‘The claim for reconciliation is puzzling. The Tribunal is actually a persecution of Hutus. No Tutsi have been brought here. This is a victor’s court. That is how the Hutu in Rwanda and in the diaspora see it, as persecution’. ‘But,’ the other defence lawyer interjects, ‘The accused persons say, and keep saying, we shouldn’t give up. We are putting everything on record for history. The truth will come out one way or another. ‘Put everything on the record’, they say ‘and then later our children will decide on the truth’.

A few days later, I meet with a judge in his office. Our conversation begins with a discussion of how the accused were selected. He picks up a ring-bound document on his coffee table and reads from the Tribunal’s Statute contained in a November 1994 UN Security Council Resolution and reads “‘Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment”, that’s in Article 17’. I then ask about the Preamble to the Resolution which states that one of the purposes of the Tribunal is to ‘contribute to the process of national reconciliation’. The judge replies, ‘If the Tribunal does its work properly it will contribute to reconciliation. But, we judges simply evaluate the credibility of evidence and relate it to the crimes alleged. The introduction of political objectives like reconciliation would undermine the quality of justice. My thoughts are governed by my judicial function. If I go into the court thinking about “purposes”, then I would not be a judge’.

That afternoon, I finally meet the prosecutor recommended to me on my first day. I explain that I’m interested in knowing what those who work at the Tribunal think its purpose is. ‘Let’s take a look at the resolution,’ he says as he goes across to his desk and picks up the same bound set of documents consulted by the judge. He reads directly from the preamble “‘will contribute to ensuring that such violations are halted and effectively redressed” - will end the cycle of impunity - and make a “contribution to peace and reconciliation”. Therefore, we are making peace. This is a fundamental part of what we do’.

So ended my first two weeks in Arusha.

‘When we walk out; what was it all about?’ a prosecution lawyer once asked, posing the question as much to himself as to me. The comments above demonstrate that those who worked at the ICTR answered that question in diverse ways. In contrast to this diversity, the Registrar of the Tribunal (Dieng 2003: 1), wrote in the first edition of the ‘ICTR Newsletter’ in 2003:

As you all know, the Tribunal is striving to effectively discharge its mandate of trying persons accused of being responsible for genocide and other serious violations of humanitarian law committed in Rwanda in 1994. By so doing, the Tribunal is playing an effective role in promoting international peace and security and putting to an end such crimes. The Tribunal is also sending a strong message, regionally and internationally, that the international community is determined to put to an end the culture of impunity, which is a hallmark of such crimes. Also, by discharging its mandate, the Tribunal is contributing to the national reconciliation and unity in Rwanda. Unfortunately, little is known about how the daily activities of the ICTR are conducted.

On one hand, this statement reflects positions noted in the introduction to this special issue, that as one of a number of transitional justice interventions in Africa, the ICTR was an exceptional response to the 1994 genocide and, as such, marked a ‘new beginning’ internationally, regionally and nationally as it tried to terminate an abiding ‘culture of impunity’. And yet, the reference to hidden ‘daily activities’ raises questions about how those immersed in the quotidian activities of international criminal justice related to the Tribunal’s purported exceptionality and as a ‘new beginning’. As indicated in the opening section, assessments were diverse and nuanced.

Recent scholarship has emphasised the need to attend to the way in which the supposedly universal mechanisms of ‘transitional justice’ are ‘localised’ (see Shaw, Waldorf, Hazan 2010). As a consequence of this research, scholars have argued that transitional justice institutions, including international tribunals, should be more attuned to the specificities of the contexts in which they operate (see Betts 2005). This emphasis on the localisation of

‘transitional justice’ has concentrated on the affected ‘locals’ and has, on the whole, not concerned itself with those who work for these institutions (Baylis 2008: 364). When they are considered, they tend to be homogenised. Tshepo Madlingozi (2010: 225), for example, speaks of ‘transitional justice entrepreneurs’ whom he describes as ‘A well-travelled international cadre of actors [who] theorize the field; set the agenda; legitimize what constitute appropriate transitional justice norms and mechanisms’. Kieran McEvoy (2007: 424-426) similarly states of transitional justice institutions that ‘actors within such institutions develop a self-image of serving higher goals’ and notes ‘the tendency of international lawyers to eulogize the glory and majesty of international law’. However, in her critique of the ‘rule of law’ aspect of ‘transitional justice’ discourses, Kamari Clarke (Clark 2009: 64) says of the ‘cosmopolitan elite’ that implements international criminal justice that the ‘interests that tie these individuals to their elite enterprise are varied – shaped by professional ambitions, corporate economic interests, a personal desire for travel, idealistic aspirations for world peace, a commitment to the moral project of human rights through rule of law mechanisms, or a combination of these’. I certainly encountered this diversity at the ICTR.

The specific sites occupied by this diverse group in which their varied interests are played out must also be recognised as *localities*, that there is no such place as the ‘international’ divorced from the messiness of quotidian practice. As I have argued elsewhere (Eltringham 2010:208) international tribunals must be seen as sites of local ‘vernacularisation’ (see Merry 2006), where assumptions and claims regarding ‘transitional justice’ are mediated, appropriated, translated, modified, misunderstood or ignored by (cosmopolitan) ‘locals’ just as they are in the villages of Sierra Leone (Shaw 2007); of East Timor (Kent 2011) or Bosnia (Mannergren Selomivic 2010). This article, therefore, explores the messy realities of the ICTR as experienced by the (cosmopolitan) locals who worked there, who both invoked and challenged official claims that the ICTR was an exceptional response that marked a ‘new beginning’. The article will gain entry to these divergent opinions by focusing on the lack of indictments of members of the Rwandan Patriotic Army for alleged massacres in Rwanda in 1994. First, following a brief introduction to the Tribunal, the article considers the claim that the Tribunal marked a ‘new beginning’. Assessments of the ICTR by lawyers and judges are

then explored through the accusations that the Tribunal enacted 'Victor's Justice'. All quotes are taken from interviews conducted in Arusha, 2005-2007.²

Context

Between 7 April and mid-July 1994 an estimated 937,000 Rwandans, the vast majority of who were Tutsi, were murdered in massacres committed by militia, the *gendarmerie* and elements of the army, often with the participation of the local population (see Des Forges 1999; Eltringham 2004; IRIN 2001). As *de facto* custodian of the ³term genocide, the United Nations was slow to designate the events as such. Only in his report of 31 May 1994, did the UN Secretary General declare genocide had been committed (UN 1994b: para 36). In a letter to the President of the UN Security Council on 28 September 1994, the post-genocide Rwandan government requested that an international tribunal be established (UN 1994c) a suggestion supported on 4 October by a UN Commission of Experts appointed by the Secretary General (UN 1994b: paras 133-42); the President of Rwanda on 6 October (UN 1994a: 5) and, on 13 October, by the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Rwanda (Degni-Ségui 1994: 19). The UN Security Council Resolution (UN 1994e), initially sponsored by the United States and New Zealand, contains four purposes for the ICTR: to bring to justice those responsible for violations of international humanitarian law (referring to genocide, crimes against humanity and war crimes); to 'contribute to the process of national reconciliation and to the restoration and maintenance of peace'; and to halt violations of international humanitarian law (deterrence). Trials began in 1996 and lasted an average of four years (one has lasted nine years) (GADH 2009a: 76).

² None of those interviewed are Rwandan. There have been no Rwandan judges at the ICTR and no Rwandan defence lawyers. Rwandans have acted as investigators for defence teams; as interpreters; and in witness protection.

³ Rwanda voted against the Security Council resolution because it believed the temporal jurisdiction should have been broader (from 1990-1994); that the ICTR should have had its own prosecutor and appeals chamber; that the judges should have had recourse to the death penalty; and that the tribunal should have been located in Rwanda (UN 1994f: 13-16).

The organs of the Tribunal investigated, and put on trial, *any person* accused of committing the following in Rwanda in 1994: genocide (as defined by the 1948 UN Convention for the Prevention and Punishment of the Crime of Genocide); crimes against humanity (a widespread or systematic attack on a civilian population) and ‘war crimes’ (Article 3 common to the 1949 Geneva Conventions). The Tribunal’s four courtrooms and offices were located in two rented wings of the Arusha International Conference Centre. The Tribunal had three principal organs: the Office of the Prosecutor (which investigated allegations; issued indictments and prosecuted the case in court); the Registry (administration); and three ‘Trial Chambers’ composed of sixteen permanent and nine *ad litem* judges. There was no jury; the three judges who sat in each trial assessed the evidence and issued a judgement. At the time of writing, seventy five cases have been completed (including twelve acquittals), sixteen cases are on appeal and nine indictees remain ‘at large’. The Tribunal has been the subject of sustained criticism regarding the selection of the accused; cost (\$1.5 billion); and length of trials (see ICG 2003; Peskin 2008: 151-234). In 2009, the Security Council called on the Tribunal to complete all its work by the end of 2012 (UN 2009b). On 20 December 2012, the Tribunal’s judges issued their final sentence (apart from appeals), sentencing Augustin Ntirabatware (Minister of Planning during the genocide) to 35 years imprisonment for genocide and crimes against humanity.

The ICTR as 'New Beginning'

The UN Security Council Resolution that brought the Tribunal into existence in November 1994 (UN 1994e) would suggest a primary focus on the national level (bring to justice those responsible, deter future crimes and ‘contribute to the process of national reconciliation and to the restoration and maintenance of peace’). But, even in the Security Council debate immediately following the resolution’s adoption it was clear that the relative weight given to these purposes, and their relationship to one another, was a matter of perspective. Although some members reiterated that the Tribunal would be an ‘instrument of national reconciliation’ (UN 1994f: 6) others were less certain, commenting that ‘The Tribunal might become a vehicle of justice, but it is hardly designed as a vehicle of reconciliation’ (UN 1994f: 7).

There were also more subtle divergences. While for some members the ICTR would ensure that ‘normality is restored to the country’ (UN 1994f: 12), for others it would end Rwanda’s *normal* ‘cycle of violence’ (UN 1994f: 5), characterised by some members as a ‘culture of impunity’ (UN 1994f: 7). Rather than ‘the restoration and maintenance of peace’, the fight against ‘impunity’ implied a radical ‘new beginning’ which, in the words of the Rwandan member, would require Rwandans to ‘learn new values’ and required the ‘construction of a new society’ (UN 1994f: 14). However, in addition to this national ‘new beginning’ hopes were expressed that the ICTR would play a role in the ‘new beginning’ for the *global* project of international criminal justice. Members hoped the ICTR would ‘provide international penal experience which will be useful for the establishment of the future permanent court [the International Criminal Court]’ (UN 1994f: 4) and ‘signify a breakthrough in creating mechanisms that would impose international criminal law’ (UN 1994f: 7). Rather than a ‘new beginning’ specific to Rwanda, the ICTR was perceived as a mechanism to further resuscitate the project of international criminal justice that had stalled after the International Military Tribunal (Major War Criminals) at Nuremberg (1945-6) and The International Military Tribunal for the Far East (1946-8). Even at this early stage, the ICTR was heralded as a ‘new beginning’, but the level at which that novelty applied (national or international) was unclear.

Given that such diverse positions on the purposes of the Tribunal were present in the first hours after its creation, it is no surprise that those who I met in Arusha held equally diverse perspectives on whether the Tribunal was an exceptional intervention marking a ‘new beginning’ or business as usual. As part of the recent resuscitation of the project of international criminal justice (beginning with the creation in 1993 of the International Criminal Tribunal for the Former Yugoslavia (ICTY)), there was no established cadre of international criminal lawyers and judges to populate the ICTR courtrooms (see Eltringham 2010). In addition, none of the lawyers or judges I spoke with recalled a prior, burning commitment to international criminal justice. A prosecution lawyer, for example, explained that, ‘through a friend’, he had been a defence lawyer at another international criminal Tribunal, had ‘got a taste for this’ and did not feel like going back to ‘burglary or bank robbery’. A defence lawyer recalled how he received an email from a friend who ‘wanted someone with a bit of French and I thought it sounded interesting’. A prosecution lawyer, having been a banking lawyer for seventeen years, simply ‘wanted to do something

different'. Another defence lawyer told me how it appeared to be 'An interesting case and involved overseas travel, but, I don't have any burning interest in International Criminal Law' while a judge told me how he was nominated by his State 'without prior consultation' and that 'It was not something I wanted to do'.

The apparent lack of *a priori* investment or experience in the project of international criminal justice means that lawyers and judges lacked *a priori* expectations. The assessment of international criminal justice they held when I spoke to them, while not pre-determined by the institutional location they occupied, was forged by the specific power(lessness) that accompanied their institutional location whether judiciary, prosecution or defence. As noted in the opening section, judges have the power to judge, but they cannot choose who is indicted; defence lawyers have the power to 'preserve history', but they consider the ICTR to be a 'Victor's Court'. As a consequence of these different institutional locations and the relative power individuals possess, the claims that the ICTR marks a 'new beginning' was interpreted in different ways. As will be discussed below, some who worked at the Tribunal reiterated the position found in the UNSC resolution and debate discussed above that, in ending impunity, the Tribunal was a new beginning for Rwanda as well as a new beginning for international criminal justice. For others, the Tribunal also marked a 'new beginning', but in a very different sense. Certain defence lawyers, described as 'political' by their colleagues, saw the Tribunal as simply a new mode of long-established colonial domination and as the revivification of 'victor's justice' first encountered at the Nuremberg and Tokyo Tribunals. For them, the ICTR was 'business as usual' (see Introduction to this volume). I also encountered judges and defence lawyers who argued that the ICTR courtroom was no different from any other courtroom they have worked in and that defending/judging someone accused of genocide was no different from defending/judging someone accused of stealing a car or burglary. As the judge says in the opening section 'we judges simply evaluate the credibility of evidence and relate it to the crimes alleged'. Both these positions downplayed (in different ways) claims to exceptionality: 'political' defence lawyers bemoan the 'business as usual' of 'victor's justice' while judges and certain defence lawyers actively promote 'business as usual' in the courtroom.

When I first arrived at the Tribunal, a national 'new beginning' for Rwanda consisting of 'peace' and 'reconciliation' permeated the ICTR's public presentation. The Tribunal's

website reproduced part of a speech made in September 1998 by the then Secretary General, Kofi Annan: ‘For there can be no healing without peace; there can be no peace without justice; and there can be no justice without respect for human rights and rule of law’. Over my first few days at the Tribunal, I became aware of other allusions to the Preamble. Pinned to a notice board outside the library there was a list of ‘New Acquisitions & Highlights’ the header of which read ‘Information for Justice and Reconciliation’. On my first day, I was handed a 26 minute video produced in 2005 entitled *Towards Reconciliation* and a leaflet entitled ‘The ICTR at a Glance’ (ICTR n.d.) which stated that the ICTR was created ‘to contribute to the process of national reconciliation in Rwanda and to the maintenance of peace in the region, replacing an existing culture of impunity with one of accountability’.

For me, such claims resonated with Sally Falk-Moore’s (2000: 2) observation that while ‘ordinary experience’ suggests law and legal institutions can only ‘effect a degree of intentional control of society’, this ‘limited degree of control and predictability is daily inflated in the folk models of lawyers and politicians all over the world ... as if there were no possible uncertainties in the results’. As time went by, however, I became aware that rather than foreground the (intangible) national ‘new beginning’ for Rwanda (reconciliation; peace), ICTR officials foregrounded the strictly quantifiable (number of arrests; number of convictions) *and* the tangible contributions to the *global* ‘new beginning’ for international criminal justice (jurisprudence). Under the heading ‘The Achievements of the ICTR’, the leaflet ‘ICTR At a Glance’ (ICTR n.d.) provided the following list:

Obtained the cooperation of the international community in the arrest of suspects, the travel of witnesses to Arusha, and the detention of convicted persons and, in general, support for its aims and activities

Secured the arrest of about 70 individuals accused of involvement in the 1994 genocide in Rwanda. Completed trials of several of those arrested ...

Laid down principles of international law, which will serve as precedents for other International Criminal Tribunals and for courts all over the world. ...

Established a complex international institution based in Arusha and Kigali. The institution includes four modern fully equipped Courtrooms and the first ever Detention Facility to be set up and run by a United Nations body.

I also became aware that this public emphasis on the global ('Laid down principles of international law') was replicated in internal documents. Of the nine 'accomplishments' outlined in an internal discussion paper on the 'legacy' of the ICTR and ICTY (ICTR 2005), only two were concerned with Rwanda ('improved the chances of reconciliation between Rwanda's ethnic groups'; 'impact of the rule of law' in Rwanda') the remaining seven concerned with the 'unique and innovative' legal decisions and judgements, the 'new beginning' for international criminal justice (ICTR 2005: 14).

Such emphases can, in part, be explained by the audit regime under which the ICTR operated. Since the introduction of a 'Completion Strategy' in 2003 (UN 2003) the Tribunal's President and Prosecutor were required to present reports to the UN Security Council every six months (UN 2004: para 6).⁴ The oral reports occasionally referred to 'our contribution to justice and reconciliation in Rwanda', but the bulk of information was the strictly tangible (number of arrests, judgements, new trials started). The vast majority of those who worked at the Tribunal were not, however, subject to an audit regime. When they asked themselves, 'When we walk out; what was it all about?', a number of possibilities presented themselves. Some are tangible (number of arrests/completed trials; jurisprudence), some are speculative (national reconciliation; peace, deterrence). Some fulfil aspirations found in the Preamble to the 1994 Resolution (number of arrests/completed trials; national reconciliation; peace; deterrence) and some do not (ending the 'culture of impunity'; jurisprudence). But, there is a third, tripartite, way in which these possibilities can be parsed; those that simply fulfil a formal fulfilment of the Tribunal as a court of law (number of arrests, completed trials); those that signal a 'new beginning' for Rwanda ('ending the "culture of impunity"'; national reconciliation; peace; deterrence) and those that signal a 'new beginning', not for Rwanda, but for the project of international criminal justice (jurisprudence).

I will consider two prosecution lawyers as an illustration of the different ways individuals related to these different possibilities. The prosecutor quoted at the start of the article invested in the Rwanda-specific promises of the Preamble ('we are making peace'). Within

⁴ Oral reports are at <http://ictr-archive09.library.cornell.edu/ENGLISH/speeches/index.html>

minutes, however, he told me, that the ICTR's 'legacy' was its global contribution to the 'new beginning' of the project of international criminal law:

We think of it as stitching together a fabric. The Tribunal, its law, its definitions of crimes, these are now all available to other institutions. This Tribunal has made an enormous contribution to the international legal regime. The Tribunal was not explicitly created for the purpose of knitting the fabric together, but these definitional achievements are consistent with that defining statute. We see our legacy as our jurisprudence.

For this prosecution lawyer, the legacy was straightforward; an 'enormous contribution to the international legal regime'. But, his use of the inclusive first person plural ('We see our legacy as our jurisprudence') is deceptive. Five days later I met with another prosecution lawyer. I began by asking him whether he thought that lawyers, on first arriving at the ICTR, believed it could achieve the promises of the Preamble? He responded with a far less celebratory tone than that of his colleague, 'We operatives of international justice assumed it would be simple, we would come and dispense justice, end the culture of impunity, establish peace and then go away. But, it didn't happen that way'. He then employed the quantifiable, 'At Nuremberg only 22 tried, even at the Special Court for Sierra Leone [SCSL, established 2002], with all the gruesome acts there, only 13 persons on trial. But, in Rwanda, on the contrary, we have tried 50 people. So, what are we doing wrong? But, nobody makes a good comparison between the ICTR and Sierra Leone or Nuremberg'.

Sensing he was reverting to the script I had encountered elsewhere, I asked him whether he considered ICTR jurisprudence (the precedents established by the trials) to be an 'achievement'. 'Jurisprudence is not an excuse', he replied, 'It's one of the complexities that we argue with; it's part of our legacy'. 'What do you mean,' I asked, 'that jurisprudence is "not an excuse?"' Talking first about the failure of the ICTR statute to provide compensation to victims he then spoke of his worries about how the ICTR was perceived in Rwanda:

To a Rwandese who knows that the Akayesu trial⁵ cost the International Community US\$600,000 and victims are dying by their hundreds every day, can we say that we are delivering justice as a legacy? Victims continue to die while those detainees who would have died of AIDS have been kept alive. Therefore, when we go we will say that we have ‘delivered justice’, but would that resonate with the victims? Our legacy will be measured by how we improve the lives of Rwandese and stopped impunity.

Compared to his colleague, he has a very different idea of what constitutes the ICTR’s legacy and, by extension, how he understands the work he does. He does not contradict his colleague’s assessment (‘We see our legacy as our jurisprudence’), but global jurisprudence is not ‘an excuse’ for local failure. The two lawyers (located in the same organ) propose different ways in which the ICTR can be assessed; simply as a court of law (‘we have tried 50 people’); as a ‘new beginning’ for Rwanda (‘improve the lives of Rwandese and stopped impunity’); or as a ‘new beginning’ for the project of international criminal justice (‘We see our legacy as our jurisprudence’). These nuanced differences of opinion become even more evident if one explores how different actors in the Tribunal related to accusations of ‘victor’s justice’.

‘Victor’s Justice’ and allegations against the Rwandan Patriotic Front

As already indicated, the ICTR was created in response to the interim report (4 October 1994) of a UN Commission of Experts which concluded that Tutsi had been victims of genocide between 6 April and 15 July 1994 (UN 1994b: paras 44 124 33 48); that ‘on the basis of ample evidence ... individuals from both sides to the armed conflict’ had committed war crimes and crimes against humanity (UN 1994b: para 146); and there were ‘substantial grounds’ to conclude that ‘Tutsi elements’ had committed ‘mass assassinations, summary executions, breaches of international humanitarian law [i.e. war crimes] and crimes against humanity’ (UN 1994b: para 82). The Commission stated that it had received from UNHCR ‘extensive evidence of systematic killings and persecution ... of Hutu individuals by the

⁵ In September 1998, Jean Paul Akayesu (mayor of Taba commune from April 1993 until June 1994) was the first person to be found guilty of the crime of genocide.

[Rwandan Patriotic Front] army' (UN 1994b: 30). This would appear to be a reference to a report sent to the High Commissioner for Refugees by Robert Gersony who, having led a UNHCR mission in Rwanda (1 August to 5 September 1994) to investigate the repatriation of refugees, had, on 19 September 1994, presented evidence to UN officials in Kigali of 'calculated, preplanned, systematic atrocities and genocide against Hutus by the RPA'; claiming that 30,000 had been massacred; that the 'methodology and scale' suggested a 'plan implemented as a policy from the highest echelons of the government'; and that 'these were not individual cases of revenge and summary trials but a pre-planned, systematic genocide against the Hutus' (ICTR 2006a: para 4; see also Khan 2000: 51-4).⁶ Although the UNHCR subsequently denied the existence of this report (Des Forges 1999: 726), it appears that Gersony also briefed US diplomats in Kigali on 17 September 1994 (ICTR 2006c) and that based on this briefing and other reports (ICTR 2006d) a US State Department memo (dated 21 September 1994) anticipated that the UN Secretary General would announce that there is 'evidence that the RPA is involved in ethnic cleansing, acts of genocide, or war crimes' (ICTR 2006b). On 10 October 1994 the Commission of Experts met with UNHCR officials including Gersony (UN 1994d: para 20) and in its final report (9 December 1994) recommended that 'an investigation of violations of international humanitarian law and of human rights law attributed to the [RPF] be continued by the Prosecutor for the International Tribunal for Rwanda' and that it would hand over 'all relevant files' to the UN Secretary General (UN 1994d: para 100; see Sunga 1995: 124).

That the ICTR would prosecute 'both sides' (those responsible for the genocide and the RPA for war crimes and crimes against humanity), remained the public intention in the early years of the Tribunal's operation. In February 1995, the UN Secretary General justified the choice of Arusha (Tanzania) as the seat of the ICTR by saying that it would ensure 'complete impartiality and objectivity in the prosecution of persons responsible for crimes committed by both sides to the conflict' (UN 1995: para 42) while Judge Laity Kama, (then President of the ICTR) stated, in September 1998, that 'All parties, including the RPF, who have committed crimes against humanity must be prosecuted. It is a simple question of equality. The credibility of international justice demands it' (quoted in Hazan 1998). 'Special investigations' into alleged crimes committed by the RPA/F were opened by the ICTR

⁶ UN officials, rejected Gersony's findings (ICTR 2006a: paras 6 7; see Eltringham 2004: 105-6).

Prosecutor in February 1999 (Cruvellier 2010: 240-1) and made public by Carla Del Ponte (the ICTR's third Prosecutor) in December 2000 (IRIN 2000). Obstruction by the Rwandan government (dominated by the RPF) which prevented prosecution witnesses from travelling to Arusha was interpreted, at the time, as a response to the threat of indictments (UN Wire 2002; ICTY 2002). Although both the ICTR President (ICTR 2002) and Prosecutor (ICTY 2002) registered formal complaints to the UN Security Council (in July and October 2002 respectively) it was only in August 2003 that the UN Security Council issued a resolution calling on Rwanda to 'render all necessary assistance to the ICTR, including on investigations of the Rwandan Patriotic Army' (UN 2003: para 3)⁷. Del Ponte was removed from her position as ICTR Prosecutor in September 2003. Although the new prosecutor, Hassan Bubacar Jallow, revived the 'Special Investigations' in 2004 (GADH 2009b: 45), the prosecutorial strategy outlined in the ICTR President's 'Completion Strategy' (May 2004) indicated that only genocide cases would be prosecuted (ICTR 2004). No indictments against members of the RPA were forthcoming, and in 2009 the Prosecutor indicated that he had no intention of issuing indictments before the ICTR closed (UN 2009a: 33).

At the time of Del Ponte's removal, it was suspected that this was due to her pursuit of the 'Special Investigation' and that she had been about to issue RPF indictments (Reydams 2005: 978) (see HRW 2003). Del Ponte herself indicated that she believed 'pressure from Rwanda contributed to the non-renewal of my mandate' (Hirondelle 2003). In 2007, Florence Hartmann, Del Ponte's former spokesperson (2000-2006) published a book in which she alleged that US diplomats had pressured Del Ponte not to indict the RPF and had, ultimately, been instrumental in removing her as ICTR Prosecutor (Hartmann 2007: 261-79).⁸ Del Ponte confirmed these allegations in her autobiography published in 2009 (Del Ponte and Sudetic 2009: 234-9).⁹

Commentators have persistently accused the ICTR of 'Victor's Justice' (see Reydams 2005; HRW 2002; HRW and FIDH 2006) and allegations against the RPF are part of the judicial record (as indicated by the references to trial exhibits above).¹⁰ As a consequence, rather than

⁷ A call repeated in a UN Security Council resolution on 26th March 2004 (Nations 2004).

⁸ Regarding US and UK support for the RPF dominated Rwandan Government see (CHRI 2009).

⁹ This explanation is challenged by others (Moghalu 2005: 133).

¹⁰ All of these exhibits are available at <http://trim.unict.org/>

a 'new beginning' for international criminal justice, the ICTR, it has been argued, was 'business as usual', marking a 'return to the Nuremberg paradigm of international criminal justice' (Reydams 2005: 981), the paradigm of 'Victor's Justice'.

Hidden Views on 'Victor's Justice'

I found that the accusation of 'Victor's Justice' was a ubiquitous, if often private, concern among those with whom I spoke at the ICTR. Among the members of the Office of the Prosecutor, none dismissed allegations against the RPF, a number were adamant that there should be RPF indictments, while others argued that the genocide, as the 'major crime base', must remain the priority to ensure the rights of defendants who had been in custody for up to ten years. When, for example, I asked a prosecution lawyer whether he was concerned about the accusations of 'victor's justice', he replied:

We are required to investigate RPF crimes because they are under our jurisdiction. But, it needs to be approached diplomatically. We are accused of 'victor's justice', but, our major crime base is the genocide. We still have people in detention awaiting trial. This must be the priority. How can we take on new cases when people have been in detention for 4-5 years and we are accused of violating their rights to a fair trial? There is a potential for the Rwandan government to disrupt trials. We are never sure that if we take up the issue what will happen.

When I asked another prosecution lawyer about the ability of the Rwandan Government to disrupt trials if RPF indictments were raised (as occurred 2001-2002), he replied, 'It would be possible for us [the prosecution] to do our cases without any one from Rwanda, but the defence would cry blue murder because all of their best witnesses are there'. Whether propelled by a sincere commitment to the rights of the accused or because infractions of the accused's rights can disrupt the prosecution's case, prosecution lawyers were keenly aware that power of the Prosecutor was curtailed by the Rwandan government. Rather than a *principled* opposition to RPF indictments, this gave rise to a prevalent, pragmatic *resignation*. As a prosecution lawyer, explained to me:

Like Nuremberg, we are accused of enacting ‘victor’s justice’. Given that the RPF committed atrocities, although not genocide, the fact that the Prosecutor is unable to provide justice for those from the other side of the conflict continues to haunt us. The dilemma we face is that the Rwandan government can disrupt our trials. When we close, that is one of the criticisms we will face. We cannot complete trials without the help of the RPF. We want international justice, but we cannot avoid dilemmas.

What I found surprising was defence lawyers’ understanding of the prosecution’s dilemma, for example, a defence lawyer told me ‘The prosecution are tying themselves to the Rwandan government in order to get access to witnesses. It’s not that the prosecutors are bad, but they’re concerned with institutional survival. They’re people who care’. Another defence lawyer observed that ‘You can’t charge the RPF, because Kagame [commander of the RPF in 1994 and President of Rwanda since 2000] would close down the Tribunal’. Even when a defence lawyer began by criticising the prosecution he still acknowledged this dilemma, ‘The Prosecution has an attitude that taints all things because they are only prosecuting one side. But, the witnesses all come from Rwanda. Therefore, the Prosecutor is stuck in this and cannot manoeuvre. The Rwandan government can close the doors and the Tribunal at a functional level will not operate’.

The revelations by Hartmann in 2007 regarding US pressure further enhanced defence ‘sympathy’ for the prosecution’s position. While in 2005 a defence lawyer told me that ‘When Del Ponte said on 13 December 2000 she would indict the RPF, she had the powers and the evidence, but no intention’, by 2007 defence lawyers were distributing copies of the relevant sections of Hartmann’s book (effectively exonerating Del Ponte) at a workshop organised to reflect on the Tribunal’s ‘legacy’. And yet, such ‘sympathy’ always had a strategic edge with defence lawyers using an appreciation for the Prosecutor’s ‘dilemma’ to imply that all the convictions were in doubt, that if ‘The Tribunal was created to combat impunity’ then one-sided convictions questioned ‘the legitimacy of all judgements’.

This was not, however, a uniform position held by all defence lawyers. One described the use of RPF crimes as a defence as ‘OK I killed my wife because he did’ (the *tu quoque*

defence¹¹) adding that because ‘people have been here for a long time, they build up personal relations with the defendants which can lead them to a loss of objectivity’. This reflects a division I encountered among defence lawyers. While representatives of ADAD (*Association des Avocats de la Defense*) distributed at the 2007 'legacy' workshop a 109-page dossier entitled ‘Avoiding a ‘Legacy’ of Victor’s Justice and Institutional Impunity: Challenges for the ICTR and the UN United Nations Security Council’ (including excerpts from Hartmann's book), another defence lawyer described ADAD as being ‘full of politically-motivated and self-promoting nitwits’ complaining that there was an ‘inordinate proportion of defence lawyers who are politically motivated’. Another defence lawyer observed how a colleague ‘Is so political. The clients all love it because he says what they want to hear, but his fellow defence lawyers hate him for it because it doesn’t help their case’. A third defence lawyer summed up this position:

our job is no different from a plumber. There’s a legal leak, you need a technician to fix it. We’d rather do interesting work and if the client isn’t a sleaze ball, all the better. But, it’s a technical exercise. The process at the Tribunal should be focused on the resolution of a dispute, both sides should argue as hard as possible. But, there’s a lot of highly politically motivated people there.

This position among defence lawyers was that the Tribunal should be an *unexceptional* place in which politics (principally ‘victor’s justice’) should be avoided in favour of technical ‘business as usual’.

Those defence lawyers described as ‘political’ also considered the ICTR to be *unexceptional*, but for entirely different reasons. For them, as 'victor's justice', it amounted to ‘business as usual’ that could be traced back to Nuremberg. And yet, this was only one element of their complex evaluation of the ICTR. One defence lawyer (among those described as ‘politically motivated’ by colleagues) told me that that the ICTR was a ‘political institution’ and that ‘It’s just a bunch of white people condemning Africans to show what will happen if they do not tow the line’. The lawyer appealed to an 'alternative logic of the ordinary' in seeing a 'neo-

¹¹ Meaning 'you, too' or 'you, also' i.e. 'Since you committed the same crime, why is it only me who is being prosecuted?'.

colonial agenda ... behind the rhetoric of exception' and a 'new beginning' (see Introduction). And yet, despite this denunciation, the lawyer still conceded that 'because the trials are adversarial it means that we can present to the public some reality in some small way, more and more stuff has come out'.

This position, that although the ICTR was a 'Victor' court' there were elements of the trials that were redeemable, was something I encountered with other defence lawyers. To return to the two defence lawyers quoted in the opening section. Although they described the ICTR as a 'victor's court' and 'a persecution of Hutus' they tempered their assessment by describing the trials as a mechanism to preserve history (see Eltringham 2009):

The accused persons say, and keep saying, we shouldn't give up. We are putting everything on record for history. The truth will come out one way or another. Put everything on the record and then later our children will decide on the truth. People will be able to read and make their own decisions in the future. We have all the records. The judgement is not made now; the judgement will be made in the future.

Like their colleague ('more and more stuff has come out') these defence lawyers saw trials as a mechanism to establish the 'true' history of the 1994 genocide. And yet, *unlike* their colleague, they did not reject the wider project of international criminal justice. Regarding the SCSL, for example, one of the two defence lawyers observed that 'In Sierra Leone, all the parties in the conflict were indicted'. Although condemning the ICTR as a 'victor's court' these defence lawyers *also* spoke of their clients' commitment to the trial; that the trial provided an opportunity for creating a 'record for history'; and that failures at the ICTR did not mean that the project of international criminal justice was universally moribund.

The idea that ICTR trials, whatever their shortcomings were redeemable as a mechanism to record 'history' was conveyed by other defence lawyers; that a client had told his lawyer 'We appreciate what you have done, that our children's children will know the truth, that truth was spoken and that truth cannot be hidden forever' while another defence lawyer observed that the 'semblance of an equality of arms' enabled the disclosure and publication of documents related to alleged RPF crimes, an opportunity to tell 'the untold story of the Rwanda War'.

While on one hand these defence lawyers denounced the ICTR as an *unexceptional* continuation of ‘Victor’s Justice’ traced back to Nuremberg and Tokyo, they simultaneously acknowledged that the ICTR provided an *extra-ordinary* opportunity to collate and disseminate a counter-narrative.

So what of the judges? When I first met the judge quoted in the opening comments at the start of the article, I asked not about allegations against the RPF, but simply how the ‘the Tribunal’ had chosen to put certain people on trial.¹² The judge responded, ‘I don’t have a direct answer, but I can say two things. First, the Prosecutor is an independent organ of the Tribunal. The decision to prosecute is made by the Prosecutor without any influence. Therefore, it is not ‘the Tribunal’ which selects the accused’. In this way, the judge swiftly disaggregated ‘the Tribunal’, delineating the power of the Prosecutor in order to demarcate his own power(lessness). To further emphasise this, the judge reached for a binder of the ICTR’s key legal documents resting on his coffee table and read to me the article of the 1994 Statute which declares the Prosecutor’s independence (UN 1994e: Art. 17). By exhibiting the ‘cult of the text’ (Bourdieu 1987: 851) and deferring to an immutable text that assigns roles and power, the judge was making clear to me that while judges must approve an indictment prepared by the prosecution (UN 1994e: Art 18(1)), they cannot order the indictment of anyone or review the Prosecutor’s decision not to indict someone who has been investigated. Unprompted, he continued:

Selective prosecution has been a judicial question, that we only prosecute Hutu people when Tutsi people also committed crimes against humanity ... you know, this idea of ‘victor’s justice’ that has been around since Nuremberg and that it is no different here. I, from a judicial point of view, I would not describe it as this, but judiciary are not involved in the selection of who to prosecute.

It is worthy of note that it was the judge who introduced the issue of ‘victor’s justice’ and the ‘business as usual’ reference back to Nuremberg. In this light, his initial emphasis on the independence of the judiciary and reference to the Statute suggests ‘victor’s justice’ is a constant accusation from which the judge was seeking to pre-emptively insulate himself.

¹² For the prosecution’s stated criteria for prosecution see (ICTR 2004b).

While abdicating responsibility was one response I encountered among judges, I also encountered other positions. One judge, for example, told me (in 2007) that ‘It’s essential that the RPF is put on trial. UN Security Council Resolutions 1503 and 1504 include the RPF’. When, later in the conversation, I asked him whether he thought one of the objectives of the ICTR was to create an ‘historical record’, he replied that if it ‘established facts in an unemotional, detached way’, it would ‘contribute to reconciliation’. He continued, however, in a more cryptic fashion:

There are small contributions here and there. The acquittals, for example, or those who have been convicted, but acquitted on some counts, demonstrate that reality is not black and white, but a mixture. Asking questions such as who shot the plane down etc.? The important thing is that it’s perceived as being fair and not short-sighted. At the same time we’ve included references to books, the testimony of experts etc. But, they cannot take over, it’s a court. There are negatives, but also blaming it for what it didn’t do.

The phrase ‘There are small contributions here and there’ resonates in a surprising way with the (‘politically motivated’) defence lawyer who suggested that ICTR trials have enabled ‘more and more stuff has come out’. In addition, the judge chooses as an example the attack on 6th April 1994 of the plane carrying the Presidents of Rwanda and Burundi which signalled the start of the genocide, an attack blamed by some on the RPF (see Thalmann 2008; see Oosterlinck et al 2012). His reference to the twelve acquittals and part-acquittals suggests balance while his comment that ‘reality is not black and white’ suggests the weakness of the duality of Hutu perpetrators vs. Tutsi-victims. Perhaps it is ‘books, testimony of experts’ that refer to alleged crimes of the RPF that he has in mind. And by ‘negatives’ does he mean the failure to indict members of the RPF? Again, the judge responded to a question I had not posed. Having indicated that he believes the RPF should be indicted, he appears to be arguing that RPF culpability has been acknowledged as far as possible *within the trials the Prosecutor has given him to adjudicate*.

The judge was evidently aware of criticism of the ICTR and fears that what it has accomplished will be ignored and that critics are ‘blaming it for what it didn’t do’.

Comments by judges' Assistant Legal Officers (ALOs) perhaps give some insight into judge's fear of blame. An ALO told me (in 2006) that the Prosecutor was just waiting to finish presenting evidence in two prominent cases, for which he needed 'the co-operation of the Rwandan authorities', but that 'I bet my bottom dollar that when these are over there will be RPF indictments'. A year later, however, the Prosecutor had made public the last 'sealed indictments' which, it transpired, were not for members of the RPF. Commenting on this, another ALO told me (in 2007) that 'everyone had thought that the three sealed indictments were RPF and everyone, including judges, were shocked when they discovered they weren't'. In a similar vein another ALO told me (also in 2007) that 'Up until four months ago everyone thought they were the RPF, that at the eleventh hour they were finally going to put things right. I think some of the judges were convinced they were and were disappointed'.

While judges impressed on me that that they were not responsible for who was indicted ('the prosecutor exercises independent judgement') or that the allegations against members of the RPF had been acknowledged as far as was possible ('There are small contributions here and there') reports from ALOs that judges hoped the Prosecutor would 'put things right' and that judges were 'shocked' and disappointed' when this did not happen suggests that judges fear such considerations will not insulate them from criticism of the ICTR in the *longue durée*. This would appear all the more likely given that detractors already criticise 'The Tribunal' (rather than the Prosecutor) for failing to indict the RPF (HRW 2009).

Conclusion

There can be no doubt that the ICTR has been promoted by its spokespersons as a 'new beginning', an exceptional, temporary *ad hoc* response that will dismantle a long-standing 'culture of impunity'. The current critique of transitional justice suggests that it is to Rwanda that one should look to assess this promise. Surveys conducted in Rwanda, however, suggest that Rwandans have very little knowledge of the institution (Longman et al. 2004).

And yet, seeking affirmation or rejection of the ICTR solely in Rwanda would obscure another site of assessment. As noted, the current critique of transitional justice tends to portray the 'local' as a place of endless colourful variation in which the hopelessly simplistic

prescriptions and logics of international criminal justice and human rights are bound to come unstuck. Such an analysis tends to portray ‘transitional justice’ as a disembodied, unified set of discourses and related practices. The analysis above, however, demonstrates that unanimity within transitional justice (even within a single organ of the Tribunal such as the prosecution) is illusory and we must attend to an interstitial locality: the transitional justice institution itself and those who inhabit it.

One of the obstacles to such exploration is that those who speak on behalf of transitional justice institutions actively promote a notion of unanimity and unity (see Baylis 2008:368). For example, discussing the choice of those who have been indicted, the Tribunal’s registrar has written ‘The Tribunal has followed a thematic and geographical approach to its work based on the patterns of involvement of leading individuals in several sectors of society - politicians, military, civil administrators, media, and clergy - and the locations of the crimes alleged’ (Dieng 2001). It is not, however, ‘The Tribunal’ that has followed this approach, but *the Prosecutor*, for it is neither the registrar, the judges nor, obviously, defence lawyers who choose who is indicted. As the judge forcefully corrected me when I asked him why has the Tribunal chosen to indict certain people: ‘The decision to prosecute is made by the Prosecutor without any influence. Therefore, it is not “the Tribunal” which selects the accused’. In another example, the former spokesman of the ICTR writes ‘When the Tribunal’s judges handed down two path-breaking judgments in late 1998 ... the Tribunal regained its confidence in full’ (Moghalu 2005: 66). Such a statement also collapses the discrete organs and associated power designated by the Tribunal’s statute. By designating ‘independent’ organs ‘The Chambers’ (judges); ‘The Prosecutor’; ‘registry’; and defence lawyers, the 1994 Statute (Nations 1994e: Art 10 20) assigns and circumscribes power. It is this differentiation, combined with the diverse biographies of lawyers and judges, that generates the diverse, messy perspectives that have been the subject of this article.

By attending to hidden views generated by this system of relations one can begin a ‘public engagement with powerful institutions whose knowledge systems constantly organize attention away from the contradictions and contingencies of practice and the plurality of perspectives’ (Mosse 2006:938). What emerges is a complex critique of the ICTR as an exceptional ‘new beginning’. Just as the judgment of a precursor institution (the Nuremberg Tribunal) stated that ‘Crimes against international law are committed by men, not by abstract

entities' (IMT 1947: 233) so, in turn, there is a need to distinguish between the image of the ICTR as a disembodied 'abstract entity' that did or did not mark a national or global 'new beginning', and the ICTR as what it actually was, a collection of situated persons negotiating their simultaneous empowerment and disempowerment and the different assessments of the institution this generated.

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